Kwan Hung Cheong v Inspektor Yusof Haji Othman & Ors

HIGH COURT (SANDAKAN) — NO CAS21–02 OF 2001
YEW JEN KIE JC
24 OCTOBER 2008

Criminal Procedure — Bail — Police bail bond with condition — Legality of police bail bond — Police bail bond against suspect remanded under s 117 of the Criminal Procedure Code and thereafter released by order of court — Whether lawful to impose condition requiring plaintiff to report to police station every month until completion of police investigation — Whether constituted deprivation of plaintiff's personal liberty in breach of art 5(1) of the Federal Constitution — Criminal Procedure Code ss 28, 29, 387, 388, 390

Based on a complaint lodged by one Ali Latip Taha ('the complainant') the police arrested without warrant the plaintiff and one Lai on suspicion of committing an offence of house-trespass or house-breaking under s 454 of the Penal Code ('Code'). The complainant was the plaintiff's tenant. After the arrest the plaintiff and Lai were brought before the magistrate who ordered the two to be remanded for three days for further investigation. At the end of the three day period the prosecuting officer applied to the magistrate for an order to release the plaintiff and Lai on police bail pending completion of police investigation. The magistrate ordered both the plaintiff and Lai to be released. Upon their release the plaintiff and Lai were made to sign separate police bail bonds issued by the first defendant. The first defendant also required the plaintiff to report to him, as the investigating officer, at the Sandakan police station for endorsement of the bail form and a month's extension of the police bail bond until completion of the police investigation. This process of the plaintiff appearing before the first defendant for the endorsement on the bail form and extension of the bail was repeated at monthly intervals from 28 January 2000 to 5 October 2000. In the interim period the plaintiff wrote to the Attorney General's Chambers regularly to enquire about the complaint against him. He finally received a reply on 11 October 2000 informing him that the police had decided to close the investigation against him and withdraw the police bail. It was the plaintiff's contention that the use of the police bail bond by the first to fifth defendants was an abuse of the powers entrusted to them under the Criminal Procedure Code ('CPC') thereby rendering their action unlawful, invalid, null and void. The plaintiff therefore proceeded by way of this summons in chambers application under O 14 A of the Rules of the High Court 1980, to question whether it was lawful for the police to issue a police bail bond against the

plaintiff who had been remanded under s 117 of the CPC and thereafter released by an order of the court; whether it was lawful for the police bail bond to impose a condition that required the plaintiff to report to the police station on a fixed date every month until completion of police investigation, ie for an indefinite period of time; and whether the misuse of the police bail bond in this case constituted a deprivation of the plaintiff's personal liberty in breach of art 5(1) of the Federal Constitution ('Constitution'). The defendants submitted that under ss 28, 29, 387 and 388 of the CPC the police were empowered to release an accused person under police bail bond and that the issuance of the police bail bond in this case was in accordance with the provisions of the law. The defendants further contended that under s 388(2) of the CPC there was no restriction in the law on the police officer to issue police bail after an accused person had been released by the court upon the expiry of a remand order.

Held, allowing the claim with costs:

(1) As s 29 of the CPC is not an empowering provision which confers power on the police or the court to release the persons arrested, the court or the police cannot rely on it to make an order to release the person arrested whether on bond or on bail. This section must be read together with other provisions which give the police power to release the person arrested on bond or bail. Therefore it was clear that the police bail bond could not have been issued pursuant to s 29 of the CPC, which could not stand on its own (see para 8).

(2) Since the plaintiff was accused of committing an offence under s 454 of the Code, which is categorised as a non-bailable offence, the relevant provision for consideration is s 388 of the CPC. Although s 388(1) of the CPC clearly confers a power upon the police to release any person accused of non-bailable offences on bail, it is exercisable before the accused is produced or brought before a court under s 117 of the CPC. However, the first defendant in this case did not exercise this power but produced the plaintiff and Lai before the magistrate (see para 13).

(3) The defendant could not have relied on s 388(2) of the CPC to issue a police bail bond because the notes of proceedings showed that the magistrate in ordering the release of the plaintiff and Lai had not imposed any conditions. If there were any conditions to be attached to the release then they would have been clearly stated in the order but there were none (see paras 21, 22 & 24).

(4) Under s 390 of the CPC the court or the police can impose conditions on the plaintiff if he were an accused person admitted on bail. However, in this case the magistrate did not admit the plaintiff to bail but instead

released him unconditionally. Therefore, the defendants could not rely on s 390 to justify the imposition of the condition requiring the plaintiff to appear at the police station (see para 29).

(5) The defendants' reliance on Form 3 of the Second Schedule must fail because Form 3 is in respect of bond and bail bond after arrest under a warrant whereas the plaintiff was arrested without warrant. Further the Form 3 does not state that the plaintiff is required to appear at the police station (see paras 30 – 31).

(6) In the light of decided cases the unlawful police bail issued by the first defendant against the plaintiff had subjected him to a form of restraint or coercion resulting in deprivation of personal liberty in breach of art 5(1) of the Constitution. As the right to personal liberty is such a constitutional right, a breach of that right must give rise to a suitable remedy or relief to enforce such constitutional right (see paras 42–44).

[Bahasa Malaysia summary

Berdasarkan aduan yang dilaporkan oleh Ali Latip Taha ('pengadu') polis menangkap plaintif dan seorang yang bernama Lai tanpa waran kerana disyaki menceroboh atau memecah rumah di bawah s 454 Kanun Keseksaan ('Kanun tersebut'). Pengadu merupakan penyewa rumah plaintif. Selepas penangkapan itu, plaintif dan Lai dihadapkan kepada majistret yang memerintahkan mereka ditahan reman selama tiga hari untuk siasatan lanjut. Pada pengakhiran hari yang ketiga, pegawai pendakwa memohon kepada majistret untuk suatu perintah melepaskan plaintif dan Lai dengan jaminan polis sementara menunggu siasatan polis. Majistret memerintahkan kedua-dua mereka dilepaskan. Setelah dilepaskan, plaintif dan Lai menandatangani bon jaminan polis yang dikeluarkan oleh defendan pertama secara berasingan. Defendan pertama juga mengarahkan plaintif untuk melaporkan diri kepadanya, sebagai pegawai penyiasat kes ini, di balai polis Sandakan untuk sokongan di borang jaminan dan pelanjutan masa selama sebulan bagi bon jaminan polis sehingga siasatan sempurna. Proses plaintif melaporkan diri di hadapan defendan pertama untuk sokongan di borang jaminan dan pelanjutan masa diulang selang sebulan dari 28 Januari 2000 hingga 5 Oktober 2000. Dalam pada itu, plaintif sentiasa menulis kepada Jabatan Peguam Negara bertanyakan tentang aduan yang dibuat terhadapnya. Akhirnya dia mendapat jawapan pada 11 Oktober 2000 memaklumkan kepadanya bahawa pihak polis membuat keputusan untuk mengakhiri siasatan terhadapnya dan menarik balik jaminan polis tersebut. Plaintif berhujah bahawa penggunaan bon jaminan polis oleh defendan pertama hingga kelima merupakan salah guna kuasa yang diberikan kepada mereka di bawah Kanun Prosedur Jenayah ('KPJ') dan menjadikan tindakan mereka salah di sisi undang-undang, batal dan tak sah. Plaintif, menerusi

permohonan saman dalam kamar di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980, mempersoalkan sama ada sah atau tidak bagi pihak polis mengeluarkan bon jaminan polis terhadap plaintif yang telah ditahan reman di bawah s 117 KPJ dan selepas itu dilepaskan oleh mahkamah; sama ada sah atau tidak bagi bon jaminan polis itu mengenakan syarat yang memerlukan plaintif melaporkan diri di balai polis pada waktu yang ditetapkan setiap bulan sehingga siasatan polis sempurna, iaitu bagi satu tempoh masa yang tidak ditetapkan; dan sama ada penyalahgunaan bon jaminan polis dalam kes ini menafikan hak kebebasan diri plaintif yang melanggar perkara 5(1) Perlembagaan Persekutuan ('Perlembagaan'). Defendan menyatakan bahawa di bawah ss 28, 29, 387 dan 388 KPJ pihak polis diberi kuasa melepaskan tertuduh di bawah bon jaminan polis dan pengeluaran bon tersebut dalam kes ini adalah mematuhi peruntukan undang-undang. Defendan-defendan seterusnya menyatakan bahawa di bawah s 388(2) KPJ, tiada sekatan undang-undang kepada pegawai polis untuk mengeluarkan jaminan polis selepas tertuduh dilepaskan oleh mahkamah setelah tempoh perintah tahanan reman tamat.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Memandangkan s 29 KPJ bukanlah peruntukan yang memberi kuasa kepada pihak polis atau mahkamah untuk melepaskan orang yang ditangkap, mahkamah atau pihak polis tidak boleh mengguna pakai peruntukan tersebut untuk mengeluarkan suatu perintah bagi melepaskan orang yang ditangkap sama ada dengan bon atau jaminan. Peruntukan ini perlu dibaca bersama dengan peruntukan lain yang memberi kuasa kepada polis untuk melepaskan orang yang ditangkap dengan bon atau jaminan. Oleh itu adalah jelas bahawa bon jaminan polis tersebut tidak boleh dikeluarkan di bawah s 29 KPJ, yang mana tidak boleh dibaca secara bersendirian (lihat perenggan 8).

(2) Oleh sebab plaintif dituduh melakukan kesalahan di bawah s 454 Kanun tersebut, yang dikategorikan sebagai kesalahan tidak boleh diikat jamin, peruntukan yang sesuai dipertimbangkan ialah s 388 KPJ. Walaupun s 388(1) KPJ jelas memberikan kuasa kepada pihak polis untuk melepaskan mana-mana tertuduh bagi kesalahan tidak boleh diikat jamin, atas ikat jamin, tertuduh boleh dilepaskan sebelum dia dihadapkan ke mahkamah di bawah s 117 KPJ. Namun, defendan pertama dalam kes ini tidak mengguna pakai kuasa ini tetapi membawa plaintif dan Lai menghadap majistret (lihat perenggan 13).

(3) Defendan-defendan tidak bergantung kepada peruntukan s 388 KPJ untuk mengeluarkan bon jaminan polis kerana nota-nota prosiding menunjukkan bahawa majistret tiada mengenakan sebarang syarat ketika memerintahkan pelepasan plaintif dan Lai. Jika adanya sebarang

A syarat yang harus dikenakan bersama perintah pelepasan itu, maka tentunya syarat itu akan dinyatakan dengan jelas dalam perintah tersebut, tetapi tiada hal yang sedemikian atas perintah tersebut (lihat perenggan 21, 22 & 24).

B (4) Di bawah s 390 KPJ, mahkamah atau pihak polis boleh mengenakan syarat kepada plaintif jika dia merupakan tertuduh yang dikenakan ikat jamin. Tetapi, dalam kes ini majistret tidak mengenakan ikat jamin kepada plaintif, malah melepaskannya tanpa syarat. Maka, defendan-defendan tidak boleh mengguna pakai s 390 untuk C mewajarkan tindakan mereka mengenakan syarat yang memerlukan plaintif melaporkan diri ke balai polis (lihat perenggan 29).

(5) Kebergantungan defendan-defendan terhadap Borang 3 dalam Jadual Kedua semestinya gagal kerana Borang 3 berkaitan dengan bon dan bon jaminan selepas penangkapan dengan waran, manakala plaintif D ditangkap tanpa waran. Lagi pula, Borang 3 tidak menyatakan bahawa plaintif dikehendaki melaporkan diri ke balai polis (lihat perenggan 30–31).

(6) Melihat kepada kes-kes yang telah diputuskan, jaminan polis yang E menyalahi undang-undang yang dikeluarkan oleh defendan pertama kepada plaintif telah menyebabkan plaintif disekat atau dipaksa dan mengakibatkannya dinafikan hak kebebasan diri yang melanggar perkara 5(1) Perlembagaan. Hak kebebasan diri merupakan hak perlembagaan yang mana pelanggaran hak tersebut seharusnya F memberi remedi atau relief yang bersesuaian bagi pelaksanaan hak tersebut (lihat perenggan 42–44).]

Notes

For cases on bail in general, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) G paras 849–928.

Cases referred to

Bird v Jones [1845] QB 742 (refd)

Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors [1985] 2 MLJ 95; H [1985] CLJ (Rep) 59 (refd)

Dasthigeer Mohamed Ismail v Kerajaan Malaysia & Anor [1999] 6 CLJ 317, HC (refd)

Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33, FC (refd)

Gulam Mohammad Azimuddin v State AIR 1959 MP 147 (folld)

I *Kimat Rai Sanwal Singh Khushalani Accused Petitioner v Emperor (32)* AIR 1945 Lahore 215 (refd)

Majlis Perbandaran Pulau Pinang v Syed Ahmed a/l MM Gouse Mohamed [2007] 1 MLJ 42, CA (folld)

Michael Raymond Taylor v PP [1989] 3 MLJ 212; [1989] 2 CLJ 539, HC

Mohammad Ali v Ram Swarup AIR 1965 Allahabad 161 (refd)
Syed Mohamad Yusuf-Ud-Din v Secretary of State of Indian (1903) 19 TLR 496 (refd)
Wales v Whitney [1885] 114 US 564 (folld)
Zahir Ahmad v Ganga AIR 1963 Allahabad 4 (refd)

Legislation referred to

Constitution of India [India] art 21
Criminal Procedure Code ss 28, 29, 117, 387, 388, 388(1), (2), 390, Form 3, Second Schedule
Criminal Procedure Code [Singapore] s 351
Federal Constitution art 5, 5(1)
Penal Code s 454
Rules of the High Court 1980 O 14A

David Fung Yin Kee (Alex Pang & Co) for the plaintiff.
Eyu Ghiam Siang (Deputy Public Prosecutor, Attorney General's Chambers) for the defendants.

Yew Jen Kie JC:

[1] In this case the plaintiff put in a summons in chambers ('SIC') under O 14A of the Rules of the High Court 1980 ('the Rules') pursuant to the order of the court consented to by both parties, given on 3 September 2007, to proceed with this action under O 14A.

[2] In this SIC, the plaintiff is applying for the following orders (as per the SIC):

(1) That items 1 and 2 of the agreed issues for trial (encl 116) would be disposed of by determining the questions of law framed as follows:

   (a) Is it lawful for the police to issue a police bail bond against the suspect who has been released by an order of the court after remand under s 117 of the Criminal Procedure Code?

   (b) Is it lawful for the police bail bond to impose a condition that the suspect has to appear and report to the police at a police station on a fixed date and which condition is then extended for an indefinite period for so long as the case against the suspect is still under police investigation?

   (c) If either or both of the use of the police bail bond described above is or are unlawful, does the misuse constitute a deprivation of the suspect's personal liberty in breach of art 5(1) of the Malaysia Federal Constitution giving rise to remedy or relief?

(2) The above questions of law will be determined in reliance on the following documents already filed with the court, namely:

(i) agreed issues for trial (encl 116);

(ii) statement of agreed facts (encl 117);

(iii) agreed bundle of documents (encl 118);

(iv) bundle of pleadings (encl 119);

(v) agreed and admitted bundle of documents (encl 120) and;

(vi) the plaintiff's bundle of documents (encl 121).

[3] The background facts leading to the present application are as follows:

(a) On 3 January 2000, the plaintiff and one Mr Lai were arrested without warrant on suspicion of committing an offence of house-trespass or house-breaking under s 454 of the Penal Code based on a complaint lodged with the police station at Sandakan by one Ali Latip Taha (the tenant of the plaintiff). They were brought before the magistrate at Sandakan within 24 hours. On 4 January 2000, upon the first defendant's application the magistrate ordered that the plaintiff and Mr Lai be remanded three days for further investigation.

(b) On 6 January 2000, the prosecuting officer Chief Inspector Choo Peng Yeang applied to the magistrate for an order to release the plaintiff and Mr Lai on police bail pending completion of police investigation. The magistrate Puan Grace Puntang ordered that both the plaintiff and Mr Lai be released. This is what the learned magistrate wrote in the notes of proceeding (p 5 of encl 118).

(c) Immediately after the release, however, the first defendant made the plaintiff and Mr Lai sign separate police bail bond issued by the first defendant for an undeposited sum of RM10,000 in two sureties.

Both suspect to be released

(d) The plaintiff had to appear before the first defendant at the Sandakan police station on 28 January 2000 when the first defendant endorsed the bail form and extended bail until 28 February 2000 in his capacity as the investigating officer. On 28 February 2000, the plaintiff appeared at the Sandakan police station when the first defendant endorsed the bail form and extended bail until 28 March 2000. The process was repeated at about monthly intervals right through to 5 October 2000.

(e) In the interim period the plaintiff wrote to the Federal Attorney General's Chambers to enquire about the decision concerning the complaint against him, emphasising that the whole matter was still hanging over him and that he had to report to the Sandakan police station each month. The first letter was written on 11 May 2000 (pp 3–6 encls 120) followed by letters of reminder dated 26 June 2000, 15 July 2000 and 1 September 2000 (pp 7–11 encl 120) respectively.

(f) On 11 October 2000, the Federal Attorney General's Chambers finally wrote to inform the plaintiff that after careful and comprehensive study of the case, they have decided to close investigation and to withdraw the police bail against him (p 13 of encl 120).

(g) It is the case for the plaintiff that the first to fifth defendants' use of the police bail bond against him is an abuse of the powers entrusted to them under the empowering statute, the Criminal Procedure Code, for the defendants had acted without or beyond their powers rendering their action unlawful or illegal. Such unlawful action is invalid, null and void. It is also in breach of the person's constitutionally guaranteed liberty under art 5(1) of the Federal Constitution resulting in appropriate relief to the plaintiff.

Question 1: *Is it lawful for the police to issue a police bail bond against a suspect who has been released by an order of the court after remand under s 117 of the CPC?*

[4] Learned federal counsel for the defendants submits that there is no clear provision under the law as to when the police bail can be imposed on an accused person or a suspect. There are several provisions in the Criminal Procedure Code, namely, ss 28, 29, 387 and 388, which empower the police to release an accused person under police bail bond, and the issuance of the police bail bond herein is in accordance with the provisions of the law.

[5] It is next contended that there is no restriction in the law on the police officer to issue police bail after an accused person has been released by the court after remand order has expired. Under sub-s (2) of s 388 of the Criminal Procedure Code, for an accused to be released on bail are as follows:

(a) at any stage of the investigation;

(b) but there are sufficient grounds for further inquiry into his guilt;

(c) the accused shall, pending such inquiry, be released on bail,

(d) at the discretion of that officer or court.

[6] Learned federal counsel also submits that s 29 ought to be read on its own, citing *Dasthigeer Mohamed Ismail v Kerajaan Malaysia & Anor* [1999] 6 CLJ 317 as support.

A [7] With respect, I do not agree that s 29 can stand on its own. The plain wordings in the section make it very clear that the provision only provides for the release of the persons arrested. It reads:

> No person who has been arrested by a police officer shall be released except on his own bond or on bail or under the order in writing of a Magistrate or of a police officer not below the rank of Inspector.

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C [8] Section 29 not being an empowering provision which confers power on the police or the court to release the persons arrested, the court or the police cannot rely on it to make order to release the person arrested either on bond, or on bail or to make order of the court. The section must be read together with other provisions which give power to the police to release the person arrested on bond or bail or the court to make an order.

D [9] This is the view adopted in *Gulam Mohammad Azimuddin v State* AIR 1959 MP 147 at p 149 referred to in *Sohoni's Code of Criminal Procedure* (1992 Ed) p 302, which held, in respect of s 59 Indian Criminal Procedure Code (the equivalent to s 29 of the Malaysian Criminal Procedure), as follows:

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> This section as it is worded does not itself confer any power on any Magistrate to release a person on bail. It only provides for the release of a person arrested without warrant on his bond or on bail or on his discharge under the special order of a Magistrate. The release is to be only when under other provisions of the Code a person has been ordered to be released on his bond or on bail or on his discharge under the special order of a Magistrate.

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G [10] For the reason stated above, it is clear that the police bail bond could not have been issued pursuant to s 29 of the Criminal Procedure Code.

[11] Section 28 is the provision on how a person arrested without warrant is to be dealt with. Simply put, this section says that a police officer making an arrest shall without unnecessary delay and subject to the provisions herein as to bail, release take or send the person arrested before a magistrate's court within 24 hours.

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I

[12] In my opinion, the relevant provisions on bail are found in ss 387 and 388 of the Criminal Procedure Code. Section 387 provides for the release on bail of person accused of a bailable offence. Whereas s 388 deals with granting of bail in non-bailable cases.

[13] The relevant provision for consideration is s 388 as the plaintiff was accused of committing an offence under s 454 of the Penal Code, which is categorised as a non-bailable offence.

[14] Section 388 states:

(i) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by such Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or [imprisonment] for life; Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(ii) If it appears to such officer or Court at any state of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds, for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry in his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(iii) ...

[15] In *Michael Raymond Taylor v Public Prosecutor* [1989] 2 CLJ 539 Chua J approved the magistrate's construction of the use of the disjunctive word 'or' in s 351 of the Singapore Criminal Procedure Code (the equivalent to s 387 of our Malaysian Criminal Procedure Code), namely, that each limb must be read disjunctively so that the provision must be read as referring to a situation where a person is arrested without warrant or is detained, or a person who is served with a summons and in obedience thereto, 'appears' in court. He may also 'appear' in court after he has been arrested, where subsequently he is released on bail by the police, or a person is produced before the court to answer the charge.

[16] This case applies equally in Malaysia not only in the context of

bailable offences, but also non-bailable offences because s 388 (1) which provides for non-bailable offences uses the same words.

[17] Section 388(1) clearly confers power upon the police to release any person accused of non-bailable offences on bail, which power, in my opinion, is exercisable before the accused is produced or brought before a court under s 117 of the Criminal Procedure Code.

[18] In the present case, the first defendant did not exercise this power instead he produced the plaintiff and Mr Lai before the magistrate's court pursuant to s 117 of the Criminal Procedure Code.

[19] Section 117 envisages a situation in which the investigation of the offence, for which the accused is arrested, cannot be completed within 24 hours after the arrest. In this situation the police officer making the investigation shall forthwith produce the accused before a magistrate who, upon finding that there are grounds for believing that the accusation or information is well founded, may from time to time authorise detention of the accused for a term not exceeding 15 days in the whole.

[20] As stated earlier, the learned magistrate was satisfied that the accusation against the plaintiff and Mr Lai was well founded and she duly ordered them to be remanded three days. On the day the remand expired the learned magistrate did not entertain the application by Chief Inspector Choo Peng Yeang for them to be released on a police bail pending completion of investigation of the case and she ordered them to be released without imposing any condition.

[21] In my opinion, the first defendant could not have relied on s 388(2) of the Criminal Procedure Code to issue the police bail bond. My reasons for saying so are as follows: Pursuant to s 388, if it appears to the officer in charge of the police district at any stage of the investigation that there are not reasonable grounds for believing that the accused person has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, such officer may release the accused person on bail pending such inquiry.

[22] A perusal of the notes of proceedings (p 5 encl 118) does not show that the prosecuting officer had applied for the police bail on the ground that there were no reasonable grounds for believing that the accused had committed a non-bailable offence, but there were sufficient grounds for further inquiry into his guilt. The records show that he applied for release of the accused and Mr Lai on the police bail pending completion of police investigation.

[23] Learned federal counsel submits that the notes of proceedings (p 5 of encl 118) does not indicate that the learned magistrate at the material time had denied Chief Inspector Choo Peng Yeang's application for the plaintiff and Mr Lai to be released on police bail. There is also no indication that counsel acting for the plaintiff or Mr Lai had objected to the application by Chief Inspector Choo Peng Yeang. It also does not show that the learned magistrate had said that the police could not carry out further investigation against the plaintiff or that the investigation should stop after the plaintiff has been released.

[24] It must be borne in mind that both the parties have agreed and are legally bound to have this case determined by way of O 14A application. For the purpose of the determination of the questions framed, the court shall only rely on the notes of proceedings which clearly shows that the learned magistrate in ordering the release of the plaintiff and Mr Lai had not imposed any conditions. To my mind, if there were any conditions attached to the release it would have been clearly stated in the order, and there was none.

[25] Having carefully perused the notes of proceeding and considered the relevant provisions, my answer to the first question herein is in the negative.

Question 2: *Is it lawful, for the police bail bond to impose a condition that the suspect has to appear and report to the police at a police station on a fixed date and which condition is then extended for an indefinite period for so long as the case against the suspect is still under police investigation?*

[26] Learned federal counsel submits that s 390 of the Criminal Procedure Code gives the police the power to impose condition on the accused to be present at the time and place stated in the bond. There is no provisions under the law that it is unlawful to impose condition on the accused to appear or present at the police station on a fixed date at intervals.

[27] Further, submits learned federal counsel, pursuant to Form 3 of the Second Schedule of the Criminal Procedure Code, the accused must be present 'to answer to the said charge, and to continue so to attend until otherwise directed by the court ...'. It is lawful for the first defendant to request the plaintiff to be present at the police station instead of the magistrate since there is no provision in law which renders it unlawful for accused to be present at police station.

[28] Reliance is placed on the Indian case of *Kimat Rai Sanwal Singh Khushalani Accused Petitioner v Emperor (32)* AIR 1945 Lahore 215 where it was held:

A Hence the magistrate admitting an accused person to bail before the completion of the investigation is competent to require him to appear before the police when needed. And, further on at p 216:

> Section 499 of the Code provides that before any person is released on bail, a
B bond ... it is, therefore, clear that if an accused person is admitted to bail by an officer in charge of police station, the officer can require him to execute a bond with one sureties binding him to appear before himself.

C **[29]** If an accused person has been admitted on bail either by the police or the court, I would agree that s 390 allows the court or the police to impose condition on the plaintiff including appearing before the police officer. In this case, however, the learned magistrate did not admit the plaintiff to bail instead he was released unconditionally, so the question of the magistrate is
D competent to order the accused to appear before the police when needed to complete the investigation does not arise in this case. In my view, the defendants cannot rely on s 390 to justify the imposition of the condition requiring the plaintiff to appear or present at the police station.

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[30] The reliance on Form 3 of the Second Schedule must also fail for the following reasons. The terms of the police bail bond entitled 'Surat Perjanjian Dan Jaminan Kepada Polis Diraja' (pp 6–7 of encl 118) issued by the first defendant and signed by the plaintiff and his sureties reads:

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> Bahawa saya (nama) Kwan Hung Cheong ... yang tinggal di Ting 4, Sentosa Court yang telah kena tuduh dengan kesalahan 454 KK adalah dengan ini mengaku akan hadir di hadapan mahkamah Majistret di Sandakan pada pukul 0900 hrs pagi pada 28. 1. 00 (atau pun pada masa dan haribulan yang diberitahukan oleh Polis Diraja
G kepada saya) kerana menjawab tuduhan ini, jika sekiranya tiada saya hadir sebagaimana yang tersebut maka saya mengaku akan rnembayar kepada Kerajaan Malaysia wang sebanyak RM10,000/- ringgit. (Undeposited).

H **[31]** A perusal of the terms of the police bail bond shows that it is not similarly worded as Form 3 in the Second Schedule. Further, Form 3 is in respect of bond and bond bail after arrest under a warrant whereas the plaintiff was arrested without warrant. Further, the Form 3 does not state that the plaintiff is required to appear or present himself at the police station.

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[32] A careful perusal of the police bond bail shows that the plaintiff was required to appear before the magistrates' court to answer the charge which is contrary to the condition of requiring the plaintiff to report to the police at the police station.

[33] In the absence of order by the learned magistrate which required the plaintiff to report to the police station, my answer to the second question is in the negative.

Question 3: *If either or both of the use of the police bail bond described above is or are unlawful, does the misuse constitute a deprivation of the suspect's personal liberty in breach of art 5(1) of the Malaysia Federal Constitution giving rise to remedy or relief?*

[34] Learned federal counsel submits that for the determination of whether the plaintiff had been deprived of his personal liberty in breach of art 5(1) of the Federal Constitution required a full trial to adduce evidence of deprivation.

[35] With respect, I do not agree. In my opinion, whether or not the plaintiff has suffered personal liberty is a question of law on the meaning of that term under art 5 of the Federal Constitution based on the facts contained in the statement of agreed facts (encl 117), the agreed and admitted bundle of documents (as to authenticity and truth) (encl 120) and the bail bond itself at pp 6–7 of encl 118).

[36] Learned federal counsel further submits that the issue of deprivation of personal liberty in breach of art 5 of the Federal Constitution does not arise because the defendant had duly complied with the requirement of ss 117 and 388 of the Criminal Procedure Code.

[37] Reliance is placed on the following cases:

(i) *Bird v Jones* [1845] QB 742 referred to in *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95; [1985] CLJ (Rep) 59, which held that a partial restriction of freedom of movement is not imprisonment.

(ii) *Wales v Whitney* [1885] 114 US 564, which held: It is obvious that the petitioner is under no physical restraint. He walked the streets of Washington with no one to hinder his movement, just as he did before the Secretary's order was served on him.

(iii) *Syed Mohamad Yusuf-Ud-Din v Secretary of State of Indian* (1903) 19 TLR 496, it was held even though a person on bail is technically in the custody of his surety, he is not 'imprisoned'.

[38] Article 5 of the Federal Constitution states:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[39] In *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 at pp 34–35, Tun Suffian LP (as he then was) said:

> Article 5(1) speaks of personal liberty, not of liberty simpliciter... In the light of this principle, in construing 'personal liberty' in art 5(1) one must look at the other clauses of this article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being 'unlawfully detained'... It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport .... With respect, we agree with what Mukherjee J said at p 96 in *Gopalan* AIR 1950 SC 27:
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> > In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. Accordingly to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: vide *Dicey on Constitutional Law*, Ed 9 pp 207–208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty.

[40] It is clear that personal liberty are (1) liberty relating to the person or the body of the individual; and (2) the negative right of not being subjected to any form of restraint or coercion.

[41] On the issue whether police bond bail subjects the person of the plaintiff to a form of physical restraint or coercion, I have found the following authorities to be useful: *Zahir Ahmad v Ganga* AIR 1963 Allahabad 4 where the court in deciding the effect of a bail in the context of a habeas corpus application to release the accused, held:

> It is common ground that the petitioner has been bailed out and is in the custody of the bondsmen, if the expression 'custody' can be used in respect of a 'bailee' and that he is no longer in jail custody. It cannot be denied that the question under consideration is a difficult one and not free from controversy. Even if the case were to be decided on first principles, we would have been inclined to hold that the fact that a person has been granted bail does not amount to his being set at liberty. It is true that after bail is granted, he is no longer in physical custody in the sense of being in prison but it is difficult to say that he has liberty of action or even complete liberty of movement
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> (Emphasis added.)

[42] The above judgment in Zahir Ahmad was followed in *Mohammad Ali v Ram Swarup* AIR 1965 Allahabad 161 at p 166, where the judge took into account the period the accused was under bail as an additional period under

'constructive custody' together with the period under unlawful physical custody. This was considered in the context of the deprivation of the accused's personal liberty under art 21 of the Constitution of India which states that 'no person shall be deprived of his life or personal liberty except according to procedure established by law' (the equivalent to art 5(1) of the Malaysian Federal Constitution).

[43] In the light of the above judicial pronouncements (of persuasive value), it is my considered opinion that the unlawful police bail issued by the first defendant against the plaintiff has subjected him to a form of restraint or coercion resulting in deprivation of personal liberty in breach of art 5(1) of the Federal Constitution.

[44] On the issue of remedy, the maxim of *Ubi jus ubi remedium*, namely, wherever there is a right there must be a remedy comes to mind. As the right to personal liberty is such a constitutional right, a breach of that right must give rise to a suitable remedy or relief to enforce such constitutional right.

[45] The case in support is *Majlis Perbandaran Pulau Pinang v Syed Ahmed a/l MM Gouse Mohamed* [2007] 1 MLJ 42 (CA), where the appellant demolished the house in which the respondent claimed an interest. The High Court held that it was wrong of the appellant to demolish the house in which the respondent was occupying without first giving him a hearing. In upholding the decision of the High Court, the Court of Appeal speaking through Gopal Sri Ram JCA identified a more fundamental basis for the remedy in the following words:

> There is another ground, a firmer ground on which the judgment of the learned judge may be upheld. This is a case where the respondent was deprived of his property otherwise than in accordance with law, namely, the requirement of the law that he should have been given an opportunity of being heard. This is in clear violation of art 13(1) of the Federal Constitution. And it has been repeatedly held by courts across the Commonwealth that compensation is payable to a person whose constitutionally guaranteed fundamental right, such as the right of life, personal liberty or property is violated (see *Maharaj v Attorney General of Trinidad & Tobago (No 2)* [1979] AC 385; *Nilabati Bahera v State of Orissa* 1993 AIR Sessions Court 1960; *Oag v The Queen* (1985) 22 CRR 171, *Fose v Minister of Safety and Security* [1996] 2 BCLR 232, *Simpson v Attorney-General* [1994] 3 NZLR 667 and *Cullen v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)* [2003] 1 WLR 1763.

[46] Based on the reasons aforesaid, my answer to question 3 is in the affirmative.

CONCLUSION

[47] Based on my answers to all the above questions framed for the

A determination by the court in this application, I hold that the plaintiff's claim should be allowed. I therefore grant the relief as prayed for in prayers (1A) with costs against the defendants to be taxed unless agreed. I further order that damages to be assessed.

B *Claim allowed with costs.*

Reported by K Nesan

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